BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Telephone Number Portability	)	CC Docket No. 95-116
	)	RM 8535

COMMENTS OF TIME WARNER COMMUNICATIONS HOLDINGS, INC.

Brian Conboy
Sue D. Blumenfeld
Thomas Jones

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

ATTORNEYS FOR TIME WARNER COMMUNICATIONS HOLDINGS, INC.

September 27, 1996

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COMMENTS OF TIME WARNER COMMUNICATIONS HOLDINGS, INC. ON PETITIONS FOR RECONSIDERATION AND CLARIFICATION

Time Warner Communications Holdings, Inc. ("TWComm") hereby files its Comments on the Petitions for Reconsideration and Clarification of the Commission's First Report and Order in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

In the Petitions for Reconsideration and Clarification of the First Report and Order, the incumbent LECs ("ILECs") and their industry associations present a wide array of arguments in support of their contention that the Commission should permit them to deploy Query on Release ("QOR") while implementing long term number portability. The Commission should reject these arguments because QOR offers the ILECs opportunities for anticompetitive behavior. The Commission should also reject requests for blanket waivers or extensions of its implementation

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[1] See Telephone Number Portability, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 95-116, RM 8535 (released July 2, 1996) ("First Report and Order").

schedule for long term solutions, and should instead consider such requests on a case-by-case basis. Moreover, the Commission should reject the contention that it lacks the authority to establish guidelines for the recovery of the costs of interim number portability. Finally, the Commission should adopt MCI's and GTE's suggested modifications to the rules for recovery of access charges where interim solutions are deployed.

II. THE COMMISSION SHOULD REJECT REQUESTS BY ILECS FOR PERMISSION TO DEPLOY QOR.

In the First Report and Order, the Commission mandated that LECs may not deploy long term number portability in a manner that treats calls to ported and non-ported numbers differently or that forces one carrier to rely on another carrier's network for routing calls.[2] As the Commission recognized, these requirements effectively prohibit the deployment of QOR.

Several of the ILECs have now urged the Commission to reconsider this decision. The ILECs argue that QOR will enhance network efficiency and save money because it will limit the need for immediate investment in upgrading SS7 networks and switch processors.[3] Moreover, the ILECs argue that, so long as it is deployed within a particular network or between consenting carriers, (1) QOR does not force carriers to rely on the LEC that

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2 See id. at ¶¶ 53-54.

3 See PacTel Petition at 7-10; USTA Petition at 9-10; Bell Atlantic Petition at 3, 5; NYNEX Petition at 4-6; SBC Petition at 2; BellSouth Petition at 23.

has deployed it to route calls;[4] (2) any increase in post-dial delay caused by QOR will not be detrimental to other carriers;[5] and (3) QOR will not delay deployment of number portability.[6]

These overstated and misleading assertions do not justify revision of the First Report and Order. They fail to prove that ILECs will not use QOR to achieve a competitive advantage over new entrants by ensuring degraded service to CLEC customers and delaying the implementation of long term number portability.

First, the Commission should approach all assertions regarding the technical characteristics of QOR with caution. The industry knows little about the effect that this addition to LRN will have on call set-up and network reliability. Moreover, while QOR may create some network efficiencies, its deployment will require the addition of signalling above and beyond that required by LRN to query donor switches. Such an addition inevitably introduces added complexity and potentially makes the network less reliable.

The Commission should approach any estimates regarding the cost of QOR with similar caution. As NYNEX concedes,[7] it is not

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4 See USTA Petition at 4-6; Bell Atlantic Petition at 8; PacTel Petition at 3-4.

5 See USTA Petition at 7; Bell Atlantic Petition at 5-6; PacTel Petition at 5-7; BellSouth Petition at 22.

6 See PacTel Petition at 11; Bell Atlantic Petition at 10; NYNEX Petition at 6.

7 See NYNEX Petition at 4 ("The exact quantification of [the cost savings created by QOR] is subject to change since, among other reasons, NYNEX's switch vendors are not sure yet what will and will not be required in their switches").

at all clear how much QOR will cost and how much it will save carriers that implement it. For example, the technology adds an extra software load in addition to the one required for LRN. How much that further load will cost is unclear. It is also important to emphasize that any cost savings will be temporary. The more effectively the Commission establishes the preconditions for facilities-based competitive entry into the local telephone market, the shorter the time period in which the purported advantages of QOR will be available (i.e., when enough calls are still made to non-ported numbers).

Second, the ILECs' protestations notwithstanding, QOR will force other carriers to rely on the network of the LEC deploying QOR. It is of course true that all interconnected carriers must rely on each other's networks to some extent. But regulators should ensure that no carrier is required to rely to an unnecessary extent on another carrier for call processing and routing. The fact is that QOR requires all carriers that deploy it to direct an additional query to the donor switch (i.e., the switch that would handle the called number if it were not ported). That step could be simple, if the query can be delivered directly to the donor switch, or complex, if the query must cross one or more tandem switches. In either case, other carriers must rely on the QOR carrier to handle the extra step without degrading service. Such reliance is unnecessary and

creates all of the potential competitive problems identified by the Commission in the First Report and Order.[8]

Third, the Commission should not be fooled by the ILECs' assurance that the post-dial delay created by QOR will be experienced by the customers of the carrier that deploys QOR and will therefore not cause competitive problems. Any difference in calling characteristics poses a threat to competition, and ILECs will have the opportunity to gain a marketing advantage by exploiting post-dial delay. For example, an ILEC could inform end-users that switching to a CLEC will result in delays for people placing calls to ported numbers. This could prevent a company that receives calls from customers or prospective customers on a regular basis to forgo switching carriers. Moreover, the ILEC could tell any subscriber who complains about post-dial delay that the problem is caused by the entry of the CLEC into the market, thus implying that competition does not benefit consumers.[9]

Finally, QOR could be used to delay deployment of long term number portability. By at least one ILEC's own admission, Lucent, the largest switch vendor in the country, has indicated that it will not be able to provide the QOR functionality in time

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[8] See First Report and Order at ¶ 53.

[9] See Bryan Gruley, "Phone Companies Call for Customer Surcharge," Wall St. J., September 13, 1996, at B1, B6 (quoting ILEC representatives promoting an end user surcharge which will convey the message to consumers that competition will cause telephone service to be more, rather than less, expensive).

to meet the implementation schedule established in the First Report and Order.[10] This fact alone demonstrates the opportunity QOR would create for an ILEC to argue that it should not be required to meet the scheduled deadlines because there is no QOR upgrade available for its Lucent switches. The Commission should not create the opportunity for such delay tactics.[11]

III. CARRIERS SEEKING RELIEF FROM THE FCC'S IMPLEMENTATION SCHEDULE SHOULD BE REQUIRED TO FILE WAIVERS ON A CASE-BY-CASE BASIS.

Several petitioning parties ask the Commission to alter the implementation schedule for long term number portability for carriers that have trouble (either because of technical infeasibility or the size of the carrier) meeting the requirements of the schedule adopted in the First Report and Order. TWComm urges the Commission not to adopt such an approach since any blanket waiver will be overly inclusive and will result in unnecessary delay. The Commission should instead require individual carriers seeking relief from its rules to apply for waivers.

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10 See Bell Atlantic Petition at 10.

11 It should be noted that, if carriers do comply with the implementation schedule, a delay in Lucent's provision of QOR only further limits the possible benefits of QOR. This is because the technology will not be available to carriers with Lucent switches at the very time when the ILECs assert that it is most needed, at the beginning of competition.

A. Rural And Small Carriers Should Not Be Granted Blanket Waivers.

NECA argues that rural carriers "that happen to serve a few customers in the top 100 MSAs" should not be required to deploy long term number portability in the absence of a bona fide request.[12] Similarly, NTCA and OPASTCO seek a blanket waiver for small and rural carriers operating in the top 100 MSAs.[13]

While it is likely that certain small or rural telephone companies will not face competition even if they provide service within one of the top 100 MSAs, the Commission should not grant them blanket waivers at this time. Rather, carriers should be required to apply for waivers which demonstrate to the Commission why a carrier should be relieved of the requirement to deploy number portability in accordance with the schedule for the top 100 MSAs. It may be appropriate for the Commission to authorize states to oversee industry meetings to determine which end offices (regardless of the carrier to which they belong) within a particular MSA will face competition. A state could then support the waiver petitions of any carriers that it has determined will not face competitive entry within the time frame set by the First Report and Order.[14]

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12 NECA Petition at 1.

13 See NTCA and OPASTCO Petition. See also USTA Petition at 18-19 (arguing that ILECs with a de minimis presence in the top 100 MSAs should be treated like carriers outside of those areas for the purposes of the deployment schedule).

14 Such an approach closely resembles the approach proposed by TWComm before the Commission adopted the First Report and Order. See TWComm Ex Parte Letter in CC Docket No. 95-116

B. The Commission Should Not Extend The Deadlines Established In The Number Portability Implementation Schedule.

Several ILECs argue that the Commission should extend the deadlines for implementation of long term number portability. For example, SBC stresses that Operational Support System changes may not be complete within the required time frame.[15] BellSouth asks that the interval between Phases I and II of the implementation schedule be extended to give LECs the time to make the necessary switch and other system upgrades.[16] NYNEX urges that the Commission take into account possible delays caused by the vendors' inability to meet the implementation deadlines.[17]

The Commission should consider issues such as these on a case-by-case basis. For many, if not most, of the switches in the top 100 MSAs, upgrades to support long term number portability can be easily accomplished within the time frames prescribed in the First Report and Order. Moreover, given the ILECs' strong incentive to delay the development of competition, claims of infeasibility should be closely scrutinized in case-by-case waiver requests, as required in the First Report and

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(February 26, 1996); Further Comments of TWComm at 9-10 (March 29, 1996). To the extent the Commission grants such waiver requests, it should either set an extension for a specific period of time or simply subject the particular office to the bona fide request requirements.

15 See SBC Petition at 10-11.

16 See BellSouth Petition at 9-14.

17 See NYNEX Petition at 7-11.

Order.[18] When reviewing waiver requests, the Commission should consider proof that another carrier facing similar technical challenges (e.g., upgrading similar generic software on similar switches) has met the required deadlines to be evidence of the petitioning carrier's ineligibility for a waiver. Finally, the Commission should not hesitate to punish carriers that fail to meet its deadlines without adequate justification.

IV. THE COMMISSION HAS THE AUTHORITY UNDER THE CONSTITUTION AND THE COMMUNICATIONS ACT TO ESTABLISH THE COST RECOVERY RULES FOR INTERIM NUMBER PORTABILITY.

The Petitions for Reconsideration contain two basic challenges to the cost recovery rules adopted in the First Report and Order for interim number portability. First, several ILECs argue that these rules result in a taking of property without just and reasonable compensation in violation of the Fifth and Fourteenth Amendments. Second, the ILECs also argue that the Communications Act does not grant the Commission the authority to set rates for interim number portability. These arguments are completely without foundation.

A. The Cost Recovery Rules For Interim Number Portability Do Not Result In An Illegal Taking.

The ILECs that try to characterize the interim number portability cost recovery rules as an illegal taking do not, and

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[18] See First Report and Order at ¶ 85 ("carriers are expected to meet the prescribed deadlines, and a carrier seeking relief must present extraordinary circumstances beyond its control in order to obtain an extension of time") (emphasis added).

cannot, offer any support for their argument.[19] Courts will not find a regulatory taking if a regulatory regime "enabl[es a] company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risk assumed."[20] The ILECs have not even attempted to demonstrate that the interim number portability cost recovery rules would endanger their ability to operate successfully, to maintain their financial integrity, to attract capital or to compensate their investors for the risk assumed. The takings argument must therefore fail.

B. The Communications Act Grants The Commission The Authority To Establish Cost Recovery Rules For Interim Number Portability.

Several ILECs argue that the Commission only has jurisdiction to establish cost recovery rules for number portability which, as defined in the statute, does not include interim solutions.[21] Specifically, the ILECs assert that, since interim solutions result in degraded service for ported numbers, they do not meet the 1996 Act definition of number portability as any solution that does not result in "impairment of quality, reliability, or convenience when switching from one

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19 See Cincinnati Bell Petition at 3-4; BellSouth Petition at 2-3.

20 Duquesne Light Co. v. Barasch, 488 U.S. 299, 310 (1989).

21 See BellSouth Petition at 4-7; SBC Petition at 3-6; Bell Atlantic Petition at 12.

telecommunications carrier to another."[22] The ILECs accordingly conclude that the Commission's statutory authority to establish cost recovery rules for "number portability" under Section 251(e)(2) extends only to long term number portability.

This argument is not supported by either the terms of the statute or the overall intent of Congress. As the Commission observed in the First Report and Order, Section 251(b)(2) requires LECs to provide number portability "to the extent technically feasible."[23] This phrase contemplates gradations of feasibility. As number portability technology advances, the provision requires LECs to implement improvements until the solutions eliminate any degradation in service provided to subscribers with ported numbers. Moreover, the provision does not, as it might have, state that LECs must provide number portability "if" technically feasible. The ILECs' attempt to read the provision as if it were written in this manner should be rejected.

The ILECs' interpretation also flies in the face of the Congressional intent that the preconditions be established for competition in the local telephone market as soon as possible.[24] It is unlikely that Congress intended, as the ILECs' argument implies, to release LECs from any statutory obligation to provide

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22 47 U.S.C. § 153(30).

23 See First Report and Order at ¶ 110.

24 This intent is reflected in the unusually short six month time frame set by Congress for implementation of Section 251. See 47 U.S.C. § 251(d)(1).

number portability until a solution that perfectly meets the statutory definition is technically feasible and can be deployed in LEC networks.[25] It is far more likely that Congress included the "to the extent that" language in Section 251(b)(2) precisely to avoid this problem, and to give the Commission authority under Section 251(d) to establish rules requiring LECs to provide the best available number portability technology.

Once it is conceded that this "dynamic" definition of number portability more closely comports with the words and phrases of the statute and with Congressional intent, it is clear that Congress explicitly granted the Commission the power to establish cost recovery rules for all number portability solutions. Section 251(e)(2) unambiguously grants the Commission this authority.[26]

Nor does the ILECs' observation that Congress was capable of referring to "interim" solutions when it wanted to, i.e., in the Section 271 checklist, render the Commission's interpretation

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[25] SBC argues that Congress intended that the rates for interim number portability should be left to interconnection negotiations between carriers negotiating in good faith. See SBC Petition at 5. But this argument proves too much. If LECs are under the obligation to provide interim number portability under Section 251(b)(2), as SBC implies, then the Commission has the authority under Section 251(e)(2) to establish cost recovery rules for those solutions.

[26] See 47 U.S.C. § 251(e)(2) ("the costs of . . . number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission") (emphasis added). The ILEC arguments notwithstanding, this provision grants the Commission the authority to depart from cost causation principles in establishing cost recovery rules for number portability.

invalid. The reference to interim number portability in Section 271(c)(2)(B)(xi) merely indicates that the Bell Operating Companies ("BOCs") were required to provide solutions that Congress knew were technically feasible at the time of passage of the Act (namely Remote Call Forwarding, Direct Inward Dialing and comparable arrangements) until the Commission established number portability rules under Section 251. At that time, the Commission had the authority to determine that number portability solutions superior to the "interim" solutions referred to in Section 271, but perhaps not fully capable of meeting the definition in Section 153(30), were technically feasible. Under Section 271, the BOCs must comply with a Commission requirement to provide such number portability solutions. The ILECs' reliance upon the reference to interim number portability in the competitive checklist is therefore misplaced.

V. THE COMMISSION SHOULD ADOPT THE MODIFICATIONS SUGGESTED BY MCI AND GTE TO THE RULES GOVERNING ACCESS CHARGE RECOVERY WHERE INTERIM NUMBER PORTABILITY IS DEPLOYED.

In its Petition for Clarification, MCI proposes a uniform scheme for the allocation of access charges among CLECs and ILECs where an interim number portability solution is deployed. Specifically, MCI suggests that (1) forwarding LECs charge interexchange carriers ("IXCs") for transport from the IXC's point of presence to the end office where the interim number portability switching function is performed; and (2) the terminating LEC charges the IXC for terminating switching and

common line charges.[27] MCI requests that all additional switching (e.g., tandem switching) and transport costs should be treated as incremental costs of number portability and should be recovered through a competitively neutral allocation mechanism.

The Commission should order all LECs to comply with this proposal. As MCI correctly points out, there is no reason that either CLECs or IXCs should be required to reimburse ILECs directly for extra routing caused by the deployment of interim solutions. Rather, ILECs should be required to recover these incremental costs of interim solutions through cost recovery regimes established by the states.

Finally, GTE points out that its current billing systems and switch software do not permit it to distinguish between local and interexchange calls that are forwarded to the CLEC through interim number portability solutions. To avoid incurring the expense required to add this capability, GTE suggests that ILECs and CLECs should be allowed to bill IXCs based on traffic samples or total access charges per line.[28] TWComm agrees that the Commission should permit carriers to divide access charge revenues in this manner while interim solutions are deployed.

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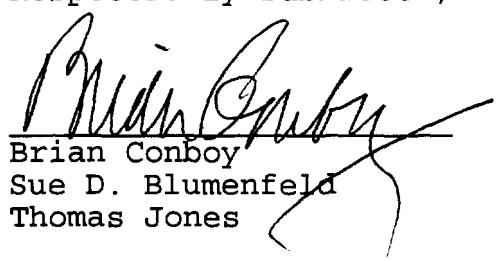
27 See MCI Petition at 4.

28 See GTE Petition at 18-20.

VI. CONCLUSION

The Commission should reject the petitions for reconsideration of the First Report and Order and adopt the recommendations of MCI and GTE for modifying the division of access charge revenues as described above.

Respectfully submitted,



Brian Conboy
Sue D. Blumenfeld
Thomas Jones

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

ATTORNEYS FOR TIME WARNER COMMUNICATIONS HOLDINGS, INC.

September 27, 1996

CERTIFICATE OF SERVICE

I, Catherine M. DeAngelis, do hereby certify that on this 27th day of September, 1996, copies of the foregoing "Comments of Time Warner Communications Holdings, Inc. on Petitions for Reconsideration and Clarification" were delivered by first class mail, postage prepaid, or hand delivered to the persons listed on the attached service list.

Catherine M. DeAngelis

HAND DELIVERED

James H. Quello
Federal Communications Commission
Room 802
1919 M Street, N.W.
Washington, DC 20554

Reed E. Hundt
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, DC 20554

Susan P. Ness
Federal Communications Commission
Room 832
1919 M Street, N.W.
Washington, DC 20554

Rachelle B. Chong
Federal Communications Commission
Room 844
1919 M Street, N.W.
Washington, DC 20554

Richard K. Welch
Federal Communications Commission
Room 544
1919 M Street, N.W.
Washington, DC 20554

Regina M. Keeney
Federal Communications Commission
Room 500
1919 M Street, N.W.
Washington, DC 20554

James D. Schlichting
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, DC 20554

Wanda M. Harris
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, DC 20554

Competitive Pricing Division
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, DC 20554
(2 copies)

Jason Karp
Federal Communications Commission
Room 544
1919 M Street, N.W.
Washington, DC 20554

Mindy Littell
Federal Communications Commission
Room 544
1919 M Street, N.W.
Washington, DC 20554

Geraldine Matise
Federal Communications Commission
Room 235
2000 M Street, N.W.
Washington, DC 20554

A. Richard Metzger, Jr.
Federal Communications Commission
Room 500
1919 M Street, N.W.
Washington, DC 20554

Michele Farquhar
Federal Communications Commission
Room 5002
2025 M Street, N.W.
Washington, DC 20554

James W. Olson
Federal Communications Commission
Room 650-L
1919 M Street, N.W.
Washington, DC 20554

Kathleen B. Levitz
Federal Communications Commission
Room 500
1919 M Street, N.W.
Washington, DC 20554

International Transcription Services, Inc.
Suite 140
2100 M Street, N.W.
Washington, DC 20037

VIA FIRST CLASS MAIL

John T. Scott, III BANMI
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, DC 20554

Carl W. Northrop AP/ARCH
E. Ashton Johnston
Paul, Hastings, Janofsky & Walker
10th Floor
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004-2400
(2 Copies)

Mark Stachiw
AirTouch Paging
Suite 800
Three Forest Plaza
12221 Merit Drive
Dallas, TX 75251

Dave Baker
Georgia Public Service Commission
244 Washington Street, S.W.
Atlanta, GA 30334-5701

Werner K. Hartenberger — COX
J.G. Harrington
Laura H. Phillips
Dow, Lohnes & Albertson, PLLC
Suite 800
1200 New Hampshire Avenue, N.W.
Washington, DC 20036-6802

Edwin N. Lavergne — TISA
Darren L. Nunn
Ginsburg, Feldman & Bress, Chartered
8th Floor
1250 Connecticut Avenue, N.W.
Washington, DC 20554

James R. Hobson — NENA
Donelan, Cleary, Wood & Maser, PC
Suite 750
1100 New York Avenue, N.W.
Washington, D.C. 20005-3934

Gene P. Belardi
MobileMedia Communications, Inc.
Suite 935
2101 Wilson Boulevard
Arlington, VA 22201

Paul Rodgers
Charles D. Gray
James Bradford Ramsay
NARUC
1102 ICC Building
POB 684
Washington, DC 20044

Neal M. Goldberg
David L. Nicoll
National Cable Television Association, Inc.
1724 Massachusetts Avenue, N.W.
Washington, DC 20036

Marlin D. Ard
Nancy C. Woolf
Pacific/Nevada Bell
Room 1523
140 New Montgomery Street
San Francisco, CA 94105

R. Michael Senkowski — PAC/NEV BELL
Jeffrey S. Linder — PCIA
Wiley, Rein & Fielding — GTE
1776 K Street, N.W.
Washington, DC 20006
(3 copies)

Richard J. Metzger
Association for Local Telecommunications Services
Suite 560
1200 19th Street, NW
Washington, DC 20036

Larry A. Peck
Frank Michael Panek
Ameritech Operating Companies
Room 4H86
2000 West Ameritech Center Drive
Hoffman Estates, IL 60196-1025

Mark C. Rosenblum
Roy E. Hoffinger
Clifford K. Williams
AT&T Corp.
Room 3244J1
295 North Maple Avenue
Basking Ridge, NJ 07920

John M. Goodman
Betsy L. Anderson
Edward D. Young, III
Bell Atlantic Telephone Companies
1133 20th Street, N.W.
Washington, DC 20036

M. Robert Sutherland
Theodore R. Kingsley
BellSouth Corporation
Suite 1700
1155 Peachtree Street, N.E.
Atlanta, GA 30309-3610

Alan J. Gardner
Jerry Yanowitz
Jeffrey Sinsheimer
Jennifer A. Jones
California Cable Television Association
4341 Piedmont Avenue
Oakland, CA 94611

Donna N. Lampert CCTA
Charon J. Harris
Mintz, Levin, Cohn, Ferris
Glovsky & Popeo
Suite 900
701 Pennsylvania Avenue, N.W.
Washington, DC 20004

David J. Gudino
GTE Service Corporation
HQE03F05
POB 152092
Irving, TX 71015-2092

Leon M. Kestenbaum
Jay C. Keithley
Norina T. Moy
Sprint Communications Company, Inc.
Suite 1100
1850 M Street, N.W.
Washington, DC 20036

Andrew D. Lipman MFS
Mark Sievers WINSTAR
Dana Frix
Swidler & Berlin, Chartered
Suite 300
3000 K Street, N.W.
Washington, DC 20007
(2 Copies)

Deborah Haraldson
NYNEX Corporation
1095 Avenue of the Americas
New York, NY 10036

James D. Ellis
Robert M. Lynch
David F. Brown
SBC Communications, Inc.
Room 1254
175 East Houston
San Antonio, TX 78205

Mark J. Tauber
Mark J. O'Connor
Piper & Marbury, LLP
7th Floor
1200 19th Street, N.W.
Washington, DC 20036

OMNIPOINT

Eric Witte
Missouri Public Service Commission
POB 360
Jefferson City, MO 65102

Lisa M. Zaina
Stuart Polikoff
OPASTCO
Suite 700
21 Dupont Circle, NW
Washington, DC 20036

David Cosson
L. Marie Guillory
National Telephone Cooperative Association
2626 Pennsylvania Avenue, NW
Washington, DC 20037

Robert S. Foosaner
Lawrence R. Krevor
Laura L. Holloway
Nextel Communications, Inc.
Suite 1001
800 Connecticut Avenue, N.W.
Washington, DC 20006

Michael Altschul
Randall S. Coleman
Cellular Telecommunications Industry Association
Suite 200
1250 Connecticut Avenue, NW
Washington, DC 20036

Gail L. Polivy
GTE Service Corporation
Suite 1200
1850 M Street, N.W.
Washington, DC 20036

David A. Irwin
Irwin, Campbell & Tannenwald, PC
Suite 200
1730 Rhode Island Avenue, NW
Washington, DC 20036-1811

ITCs

David N. Porter
MFS Communications Company, Inc.
Suite 300
3000 K Street, N.W.
Washington, DC 20007

Susan Drombetta
Scherers Communications Groups, Inc.
575 Scherers Court
Worthington, OH 43085

David A. Gross
Kathleen Q. Abernathy
AirTouch Communications, Inc.
Suite 800
1818 N Street, N.W.
Washington, DC 20036

Charles V. Gerkin, Jr. AIRTOUCH
Chorey, Taylor & Feil, PC
Suite 1700
The Lenox Building
3399 Peachtree Road, N.E.
Atlanta, GA 30326

James S. Blaszak AD HOC TUC
Levine, Blaszak, Block and Boothby
Suite 500
1300 Connecticut Avenue, N.W.
Washington, DC 20036-1703

Mary McDermott
Linda Kent
Charles D. Cosson
Keith Townsend
United States Telephone Association
Suite 600
1401 H Street, N.W.
Washington, DC 20005

Durward D. Dupre
Mary W. Marks
Southwestern Bell Telephone Company
Room 3558
One Bell Center
St. Louis, MO 63101

Bruce Beard
Southwestern Bell Telephone Company
Suite 100 A
17330 Preston Road
Dallas, TX 75252

Lee L. Selwyn
Jennifer A. Johns
Economics and Technology, Inc.
One Washington Mall
Boston, MA 02108-2603

Maureen O. Helmer
John Starrs
New York State Department of Public Service
Three Empire State Plaza
Albany, NY 12223-1350

Mark J. Golden
Robert L. Hoggarth
Personal Communications Industry Association
Suite 700
500 Montgomery Street
Alexandria, VA 22314-1561

Christopher J. Wilson CBTC
Frost & Jacobs
2500 Central Trust Center
201 East Fifth Street
Cincinnati, OH 45202

Thomas E. Taylor
Frost & Jacobs
6th Floor
201 East Fourth Street
Cincinnati, OH 45202

CBTC

Virginia J. Taylor
California Department of
Consumer Affairs
Suite 3090
400 R Street
Sacramento, CA 95814-6200

Cynthia Miller
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Michael J. Shortley, III
Frontier Corporation
180 South Clinton Avenue
Rochester, NY 14646

Robert C. Mackinchan, Jr.
Vincent L. Crivella
Michael J. Ettner
Jody B. Burton
General Services Administration
Room 4002
18th and F Streets, NW
Washington, DC 20405

Snavely, King, Majoros,
O'Connor & Lee, Inc.
1220 L Street, N.W.
Washington, DC 20005

CNSLT

Loretta J. Garcia
Donald J. Elardo
MCI Telecommunications Corporation
1801 Pennsylvania Avenue, N.W.
Washington, DC 20006

Campbell L. Ayling
NYNEX Corporation
1111 Westchester Avenue
White Plains, NY 10604

Betty D. Montgomery
Duane W. Luckey
Steven T. Nourse
Attorney General of Ohio
180 East Broad Street
Columbus, OH 43215-3793

Peter Arth, Jr.
Edward W. O'Neill
Mary Mack Adu
Public Utilities Commission
of the State of California
505 Van Ness Avenue
San Francisco, CA 94102